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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB,

Plaintiffs/Petitioners,

v.

CALIFORNIA DEPARTMENT OF CONSERVATION, DIVISION OF OIL, GAS, AND GEOTHERMAL RESOURCES, et al.,

Defendants/Respondents,

AERA ENERGY LLC, et al.,

Respondents-in-Intervention, and

WESTERN STATES PETROLEUM ASSOCIATION, et al.,

Respondents-in-Intervention.

Case No: RG15769302

ASSIGNED FOR ALL PURPOSES TO JUDGE GEORGE C. HERNANDEZ, JR. DEPARTMENT 17

PLAINTIFFS/PETITIONERS' OPENING BRIEF

Date: July 15, 2016
Time: 8:30 a.m.
Dept: 17

Action Filed: May 7, 2015

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INTRODUCTION

To preserve the nation's current and future underground sources of drinking water, Congress instituted a straightforward, precautionary system in the federal Safe Drinking Water Act ("SDWA" or "Act"). Under the Act, all underground injections are presumed harmful and strictly prohibited unless affirmatively authorized by permit or rule. Critically, the Act directs that no authorization may be issued until the proposed well operator demonstrates that the injection will not damage a high-quality, protected aquifer. For injections by the oil and gas industry, proof of safety comes exclusively in the form of an "aquifer exemption," a rigorous scientific determination that the particular aquifer into which a well operator proposes to inject is not used currently—and, of equal importance, cannot be used in the future—to supply drinking water. Thus, without an exemption in place, no underground injections may occur in protected aquifers.

Despite the simplicity of SDWA's regulatory command, the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources ("DOGGR") has for decades sacrificed California's protected groundwater by allowing thousands of wells to inject oil industry wastewater and other harmful fluids into aquifers for which no exemption was or ever had been in place as required by law. Caught red-handed, DOGGR admits—as it must—that this practice violates the Act. However, rather than stop the fouling of California's drinking water resources immediately, DOGGR has created an emergency "safe harbor" so that thousands of wells may continue injecting into protected aquifers, some until as late as 2017. In fact, DOGGR has stated that it intends to enlarge the scope of its unlawful conduct by issuing new permits to inject into such aquifers until 2017. On top of that, it also has refused to conduct a review of tens of thousands of other wells, leaving uncertain just how many injection wells are currently operating unlawfully.

For the sake of the future of California's precious underground water supply, this scofflaw agency behavior must cease. Pursuant to Code of Civil Procedure section 1085, Plaintiffs Center for Biological Diversity and Sierra Club ("Plaintiffs") seek a writ of mandate to enforce DOGGR's duty to abide by the foremost requirement of SDWA and the implementing agreement for the State of California, namely, that *all* injections into protected aquifers are presumed harmful and must be prohibited in the absence of an "aquifer exemption." Plaintiffs also seek a declaration from this Court, pursuant to Government Code section 11350, that DOGGR's "safe harbor" regulations—adopted on an emergency basis—violate the rulemaking requirements of the Administrative Procedure Act ("APA").

BACKGROUND

I. Statutory and Regulatory Background

A. The Safe Drinking Water Act

"Congress passed the SDWA in 1974 in response to its concern that underground sources of drinking water were threatened by unregulated underground injections. [citation]." (*U.S. v. King* (9th Cir. 2011) 660 F.3d 1071, 1078.) Reflecting Congress's conclusion "that the most effective way to ensure clean drinking water was to prevent pollution of underground aquifers in the first place," "[t]he injection provisions of the SDWA are 'preventative.'" (*Id.* at p. 1079 [citing 1974 U.S. Code Cong. & Admin. News at p. 6463]; see also *Legal Envt'l Assistance Foundation, Inc. v. U.S. EPA* (11th Cir. 1997) 118 F.3d 1467, 1474 [SDWA's "statutory purpose" is "preventing underground injection which endangers drinking water sources"].) To accomplish Congress's goal of prevention, SDWA strictly prohibits all underground injections—including even the injection of clean water—until it is proven that the aquifer in question contains water neither now nor in the future suitable for drinking, and the U.S. Environmental Protection Agency ("EPA") has issued, and codified, an exemption certifying this to be the case. (*King*, *supra*, 660 F.3d at pp. 1077, 1079-81; 42 U.S.C. §§ 300h(b)(1)(A)-(B), 300h-4(a).) This is simple, black letter law. The prohibition on all underground injections is necessary because even "[i]njections of clean water into the ground can cause the movement of contaminants into an aquifer." (*King*, *supra*, 660 F.3d at p. 1077.)

This prohibition applies to all "Class II" injection wells: "[w]ells which inject fluids" as part of oil and natural gas storage, production, and recovery. (40 C.F.R. § 144.6(b).) Class II injection wells are used for a variety of purposes. For example, the oil and gas industry frequently uses them to dispose of toxic-laden wastewater that flows to the surface during the extraction of oil and gas resources, rather than transporting the wastewater to treatment facilities to remove the contaminants. (AR000168 [Transcript of Video Recording, Joint Hearing Senate Natural Resources and Water Comm. and Senate Env. Quality Comm. (Mar. 10, 2015) ("Joint Hearing Transcript")].)[1] Injection wells also are used in so-called "enhanced oil recovery" or "EOR" techniques to increase oil production. For example, wells may be used to inject fluids to push oil to the surface at a nearby production well. (AR000167 [Joint Hearing Transcript, describing "water flood operation"].) Other EOR injection wells ("cyclic steam wells") inject steam to heat oil beneath the surface, thereby

[1] Citations to DOGGR's administrative record are denominated with "AR" and the Bates number.

decreasing its viscosity while generating pressures high enough to fracture the surrounding rock, which helps move the oil toward the surface. (AR000167, 184 [Joint Hearing Transcript].)

In each state, SDWA requires the establishment of an "underground injection control" ("UIC") program. (42 U.S.C. § 300h.) A state UIC program may be administered by EPA directly or, upon review and approval by EPA, by the state itself, a delegation of authority commonly referred to as "state primacy." (42 U.S.C. §§ 300h, 300h-1, 300h-4; see also 40 C.F.R. § 144.1(e) ["Overview of the UIC program"].) In either case, all UIC programs, without exception, must meet certain "minimum requirements" and "restrictions." (42 U.S.C. §§ 300h(b), 300h-4(a).) SDWA mandates that all state UIC programs prohibit any underground injection that is not authorized by a permit or rule. (42 U.S.C. § 300h(b)(1)(A).) The Act also requires, *prior* to issuance of a permit or rule, a demonstration "that the underground injection will not *endanger* drinking water sources." (42 U.S.C. § 300h(b)(1)(B), italics added; see also *id.* at § 300h-4(a) [state program must "prevent underground injection which endangers drinking water sources"].)[2]

Consistent with Congress's focus on prevention, SDWA defines the phrase "endanger drinking water sources" expansively. (See 42 U.S.C. § 300h(d)(2).) Rather than limit endangerment to detection of contamination in current drinking water supplies, the statute specifies that an underground injection "endangers" a drinking water source if it creates a mere *risk* of contaminating an aquifer, *even if the aquifer is not currently used as a source of drinking water*. (42 U.S.C. § 300h(d)(2) ["Underground injection endangers drinking water sources if such injection *may* result in the presence in underground water which supplies *or can reasonably be expected to supply* any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons"] [italics added]; see also AR000186-7 [Joint Hearing Transcript, noting that water not currently potable may be used as a future drinking water supply where it is "economically treatable"].) In other words, whether injection is prohibited depends on whether the aquifer receiving it can now or in the future be used for drinking purposes—not, for example, on whether the injected substance contaminates the aquifer or whether tests of nearby drinking water wells subsequently detect contamination.

[2] The term "underground sources of drinking water" (or "USDW") means all non-exempt aquifers containing groundwater with less than 10,000 mg/L of total dissolved solids ("TDS"), at a quantity sufficient for a public water system. (40 C.F.R. § 144.3.) Herein we use the term "protected aquifers" to refer to underground sources of drinking water for which no exemption to allow injections has been obtained. DOGGR typically refers to such aquifers as "non-exempt."

To overcome the blanket prohibition on underground injections in protected aquifers, an oil or gas injection well operator must first obtain a "aquifer exemption." Obtained through a robust regulatory process that includes a detailed, technical analysis, public comment, and formal, codified EPA approval, an aquifer exemption is granted only if the aquifer to receive the injection: (a) does not currently serve as a source of drinking water; and (b) cannot now and will not in the future serve as a source of drinking water. (40 C.F.R. §§ 144.7, 146.4; Cal. Code Regs., tit. 14, § 1760.1 [stating "'[a]quifer exemption' means an aquifer exemption proposed by the Division and approved pursuant to the Code of Federal Regulations, title 40, section 144.7"].) "[I]n the absence of a showing by the applicant that a proposed injection is safe, the SDWA presumes that the injection will endanger an [underground source of drinking water]" and permission for the injection must be denied. (*King*, *supra*, 660 F.3d at p. 1079.)

B. DOGGR's Authority and Duties under the Safe Drinking Water Act

In 1983, EPA delegated to DOGGR responsibility for administering California's UIC program with respect to Class II wells. (40 C.F.R. § 147.250; 48 Fed.Reg. 6336 (Feb. 11, 1983).) A Memorandum of Agreement ("MOA" or "Primacy Agreement") between EPA and DOGGR details DOGGR's regulatory responsibilities with respect to Class II injection wells. (AR000404-414 [MOA].) The MOA has been formally incorporated by reference into and codified by the federal regulation that both approves and defines California's UIC program under SDWA. (40 C.F.R. § 147.250 [incorporating MOA into federal regulations].) The MOA also constitutes enforceable California state law, as the Public Resources Code explicitly defines the "Underground Injection Control Program" with reference to federal authority, specifying that it is the "program covering Class II wells for which [DOGGR] has received primacy from the United States Environmental Protection Agency." (Pub. Resources Code, § 3130, subd. (e); see also Order Overruling DOGGR's Demurrer (Oct. 5, 2015) at p. 2 ["the UIC Program that DOGGR is tasked with administering expressly includes the Memorandum of Agreement ('MOA') entered into by DOGGR and the EPA, pursuant to the grant of primacy"].)

The MOA distills the most fundamental requirement of SDWA into a single, plainly stated mandate: "an aquifer exemption must be in effect prior to or concurrent with the issuance of a Class II permit for injection wells into that aquifer." (AR000409-410 [MOA]; see also Order Overruling DOGGR's Demurrer (Oct. 5, 2015) at p. 2 ["Th[e] MOA prohibits the issuance of a Class II permit for injection wells into an aquifer unless there is an aquifer exemption in place"].) As DOGGR itself

puts it equally succinctly: "*The Primacy Agreement mandates that the Division will not authorize injection into aquifers that contain less than 10,000 mg/L TDS unless the aquifer meets the criteria for an aquifer exemption and an exemption has been designated by the Division and approved by US EPA.*" (Exh. A to Decl. of H. Kretzmann (May 18, 2016) [Notice of Proposed Rulemaking Action for Permanent Regulations (May 29, 2015)] at p. 4, italics added.)

II. Factual Background

A. Class II Injection Wells and Contamination of Underground Sources of Drinking Water

California is home to over 50,000 Class II wells. (AR000150 [DOGGR Letter to EPA (Feb. 6, 2015)].) Many of these wells are used for wastewater disposal, with roughly 30 percent of the wastewater generated by the oil industry injected underground in lieu of treatment. (AR000166, 168 [Joint Hearing Transcript].) The wastewater typically contains benzene, a known carcinogen. (See generally AR006782-6797 [DOGGR Report, "Benzene in Water Produced From Kern County Oil Fields Containing Fresh Water" (1993) ("Benzene Report")].) In fact, benzene has been detected in oil and gas wastewater at levels 18,000 times higher than the maximum concentration allowed in drinking water. (Compare AR006795 [Benzene Report, finding 18.0 parts per million or 18,000 micrograms per liter (µg/L)] with Cal. Code Regs., tit. 22, § 64444 [setting maximum contaminant level for drinking water at 1 µg/L].) Industry wastewater also may contain a litany of other harmful substances including ethylbenzene, toluene, xylenes, hydrocarbons (dispersed oil), lead, arsenic, acids, and even radioactive materials. (See AR006798-6850 [Report, Technical Summary of Oil & Gas Produced Water Treatment Technologies (Mar. 2005)]; AR006853, 6854-6855 [Wikipedia Article "Produced Water"].)

Contamination also is an issue for EOR injection wells. Such wells inject contaminants into aquifers, change subsurface pressures, and may mobilize oil, heavy metals, and other harmful substances that were locked in place to migrate to nearby, high quality aquifers. (AR000167-168, 184-185 [Joint Hearing Transcript]; Exh. E to Decl. of T. Zakim (May 18, 2016) ["Background Information" Staff Report for Joint Senate Hearing (March 10, 2015) ("Staff Report")] at p. 7 [describing "[m]ovement from one part of a formation to another" as one potential pathway of contamination caused by a Class II well].) Likewise, contamination may increase when operators inject fluids under high pressure, which may fracture underground rock formations and release or mobilize contaminants. (AR000184 [Joint Hearing Transcript].) Though injection pressure is regulated to prevent fracturing, regulatory limits are "routinely" exceeded and it simply "is not

possible" to inject into some kinds of rock formations without fracturing them. (Exh. E to Decl. of T. Zakim (May 18, 2016) [Staff Report (March 10, 2015)] at p. 12 ["DOGGR has acknowledged that cyclic steam injection routinely exceeds the fracture gradient of the formation in violation of these [UIC] regulations"]; AR000184 [Joint Hearing Transcript]; AR003655 [UIC Project Application by Berry Petroleum (July 18, 2003)].)

Though injections of industry wastewater and EOR fluids obviously introduce contaminants into the aquifers, "[t]he SDWA and its implementing regulations are not concerned with whether an injected fluid is itself contaminated. Rather, they are concerned with the result of 'injection activity.'" (*King*, *supra*, 660 F.3d at p. 1077.) The law prohibits the injection activity itself because even "injections of clean water into the ground can cause the movement of contaminants into an aquifer. For example, contaminants may dissolve into clean water as the injected water passes through the soil on its way to an aquifer." (*Ibid.*) Therefore, "[a]ny injection into the aquifers that are not exempt has contaminated those aquifers." (AR000182 [Joint Hearing Transcript, statement of State Water Board Deputy Director Jonathan Bishop].)

B. DOGGR's Acknowledged Failure to Comply with SDWA

Injection into protected aquifers in California has occurred for decades, and DOGGR has been aware of SDWA violations since at least 2010. (See Exh. F to Decl. of T. Zakim (May 18, 2016) [DOGGR Memo, "Underground Injection Control (UIC) Program Expectations" (May 20, 2010)] at p. 3.) That same year, EPA commissioned an audit that showed DOGGR was committing serious and widespread violations of SDWA, including failures to prohibit injections into protected aquifers and to conduct proper reviews of injection operations. (Exh. G to Decl. of T. Zakim (May 18, 2016) [EPA Letter to DOGGR (July 18, 2011) [transmitting findings of EPA's 2011 audit].) Since then, the ever-expanding scope of DOGGR's SDWA violations has been documented in written communications between DOGGR and EPA. (See, e.g., AR000120-121 [EPA Letter to DOGGR (July 17, 2011), describing "a preliminary review focused on aquifer exemptions"]; AR000102-112 [DOGGR Response to EPA 2011 Audit (Nov. 2012)]; AR000351 [EPA Letter to DOGGR (Dec. 22, 2014)]; AR000151 [DOGGR Letter to EPA (Feb. 6, 2015)].)

In 2012, DOGGR admitted "some operators have operated UIC projects without meeting all the requirements outlined in statutes and regulations," but did not stop the violations. (AR000112 [DOGGR Response to EPA 2011 Audit (Nov. 2012)].) In July 2014, EPA requested that DOGGR create a timetable for the review of its own files and identification of the scope of SDWA violations.

(AR000121-122 [EPA Letter to DOGGR (July 17, 2014); AR000351-352 [EPA Letter (Dec. 22, 2014)].) In December 2014, DOGGR responded by acknowledging that its data on Class II wells was "incomplete and contained inaccuracies." (AR000351 [EPA Letter (Dec. 22, 2014)].)

In a February 6, 2015 letter to EPA, DOGGR finally acknowledged "that in the past it ha[d] approved UIC projects in zones with aquifers lacking exemptions." (AR000151 [DOGGR Letter (Feb. 6, 2015)].) DOGGR's letter estimated the number of affected wells to be approximately 2,500, including both wastewater disposal and EOR wells. (AR 000152; see also AR000162 [Enclosure B to DOGGR Letter (Feb. 6. 2015), summarizing wells potentially injecting into protected aquifer zones].) DOGGR also announced a plan to review an additional 30,000-plus wells that potentially were injecting into protected aquifers. (AR000152 [DOGGR Letter (Feb. 6, 2015)].) DOGGR claimed that it would have a full understanding of the extent of the problem only after this review is complete sometime "in early 2016." (*Ibid.*)

C. DOGGR's Emergency "Safe Harbor" Regulations

By March 2015, DOGGR had issued shutdown orders for just 23 unlawfully permitted wells. (See AR000002 [DOGGR Comment Response on Emergency Regulations]; Exh. H to Decl. of T. Zakim (May 18, 2016) [DOGGR Emergency Orders (July 2, 2014) stating that "[i]njection into these wells pose[d] a danger to life, health, property, and natural resources . . . ."] at p. 2.) Rather than issue shutdown orders for all wells unlawfully injecting into protected aquifers, DOGGR initiated an emergency rulemaking that shielded the unlawful activity from the reach of the law.

On April 2, 2015, DOGGR published notice of its intent to issue emergency regulations, titled "Aquifer Exemption Compliance Schedule Regulations" ("emergency regulations") that allow aquifer contamination to continue for up to two more years. (AR000014-26 [DOGGR, Notice of Proposed Emergency Rulemaking Action, Aquifer Exemption Compliance Schedule Regulations (Apr. 2, 2015)].) DOGGR proposed to set a rolling schedule that requires injection well operators to either obtain an aquifer exemption or quit operations—with safe harbor provided to the vast majority of unlawfully permitted wells through February 15, 2017. (AR000054-55 [Text of Proposed Emergency Regulations].)

In comments submitted during the available five-day emergency comment period, Plaintiffs objected to the regulations as failing to meet the requirements of the APA and directly conflicting with the agency's SDWA obligations. (AR000077-91 [CBD Comments on Emergency Regulations (Apr. 14, 2015)]; AR 000070-73 [Sierra Club Comments on Emergency Regulations (Apr. 14,

2015].) Sixteen California legislators also submitted comments, stating that they were "concerned [that] these regulations allow for the continued injection into underground aquifers that could serve or are serving as sources of drinking water, in violation of the SDWA." (AR000066 [Letter from Assembly member D. Williams, et al., California Legislature (Apr. 14, 2015)].) In all, over 17,000 comments were submitted. (AR000057 [noting example email was one of 17,611 received].)

DOGGR responded to all of these comments with a three-page response and issued a Revised Finding of Emergency. (AR000001-3 [DOGGR Response to Comments]; AR000041-46 [Revised Finding of Emergency].) DOGGR formally adopted its emergency regulations on April 20, 2015. (AR000027-40 [Notice of Approval of Emergency Regulatory Action and related documents (Apr. 20, 2015)].)

D. DOGGR's Ongoing Failure to Address Unlawful Injections

On May 15, 2015, *after* its adoption of the emergency regulations, DOGGR informed EPA that it had additionally "identified approximately 3,600 cyclic steam wells that . . . are shown in Division's databases as not being associated to a permitted injection project" and that nonetheless were injecting into protected aquifers. (Exh. I to Decl. of T. Zakim (May 18, 2016) [DOGGR Letter to EPA (May 15, 2015) at p.3.) In other words, an even larger group of EOR wells than originally understood was injecting into protected aquifers—but these have no injection permit at all. DOGGR told EPA it would complete a review of these wells by July 31, 2015. (*Ibid.*) Instead, DOGGR has now decided to ignore the situation. In a July 31, 2015 letter, DOGGR informed EPA that it had determined that the wells "appear to present a low risk," and therefore decided "no further analysis of [these] wells is required." (Exh. J to Decl. of T. Zakim (May 18, 2016) [DOGGR Letter to EPA re: Submittal of Review Information for Category 2 Wells (July 31, 2015)] at p. 1.) DOGGR has decided to allow these unlawful injections, which lack permits and the aquifer exemptions that are a predicate for issuance of a permit, to continue indefinitely.

DOGGR also appears to have abandoned its commitment to review the remaining 30,000 wells potentially injecting into protected aquifers that it identified previously but did not assess prior to issuance of the emergency regulations. EPA and DOGGR agreed that DOGGR would complete a comprehensive review of its well files by February 15, 2016, but DOGGR failed to release any sort of review by that date, and still has not as of this filing. (See AR000152 [DOGGR Letter (Feb. 6, 2015), committing to completing review of 30,000 wells by "early 2016"]; AR000465-466, 468-469 [EPA Letter to DOGGR (March 9, 2015), listing DOGGR's "Corrective Action Plan Schedule"

commitments, including obligation to complete review of 30,000 wells by February 15, 2016].) This missed deadline means either DOGGR has decided not to determine the true scope of SDWA violations and unlawful injections for these wells, or its regulatory failure is so systemic that it remains unable to do so.

Though DOGGR asserted in its emergency rulemaking that it "anticipates that many of the aquifers previously approved to receive injection without an aquifer exemption in place will in fact qualify for exemptions," to date, only one aquifer exemption application has been filed by DOGGR with EPA. (AR000043 [Revised Finding of Emergency (Apr. 1, 2015), noting anticipation that exemptions will be received]); Exh. J to Decl. of H. Kretzmann (May 18, 2016) [DOGGR Website discussing one aquifer exemption application pending with EPA].)[3]

Further, despite asserting that the purpose of the emergency regulations was to "eliminate[e] injection into aquifers that are protected" (AR000041 [Revised Finding of Emergency (Apr. 1, 2015)]), DOGGR continues to issue *new* unlawful permits to operators for wells injecting into a protected aquifer. Between December 22, 2014 and November 5, 2015, for example, DOGGR has approved at least 66 permits for new injection wells operating in protected aquifers. (See AR000154 [DOGGR Letter (Feb. 6, 2015), stating "[n]ew injection will be allowed" into protected aquifers until February 2017]; AR000966-968 [approval for new cyclic steam injection well into a non-exempt aquifer, dated Oct. 28, 2015]; AR000475-968 [Index pp. 5-8]; Exh. C to Decl. of T. Zakim (May 18, 2016) [Letter From DOGGR's Counsel Regarding Record (Apr. 7, 2015), describing contents of writ record as including wells newly authorized into non-exempt aquifers, at p. 2].)

Since DOGGR's original adoption of the emergency regulations, DOGGR has twice renewed them in identical form, on October 2015 and January 2016. (Exh. D to Decl. of H. Kretzmann (May 18, 2016) [Notice of Request to Re-Adopt Emergency Regulations (Oct. 1, 2015)]; Exh. E to Decl. of H. Kretzmann (May 18, 2016) [Notice of Request to Re-Adopt Emergency Regulations (Jan. 7, 2015)].) On April 20, 2016, DOGGR adopted permanent regulations with identical language to its emergency regulations. (Exh. F to Decl. of H. Kretzmann (May 18, 2016) [Approval of Permanent Regulations (Apr. 20, 2016); Exh. G to Decl. of H. Kretzmann (May 18, 2016) [Final Text of Permanent Regulations]; Exh. H to Decl. of H. Kretzmann (May 18, 2016) [Final Statement of Reasons for Permanent Regulations (Apr. 20, 2016)].)

[3] A second exemption application for Kern County Round Mountain is in preliminary stages for state review; it has not yet been submitted to EPA.

STANDARD OF REVIEW

I. Traditional Mandamus

A court's review of agency action on mandamus is de novo, and no deference is due the agency. California Code of Civil Procedure section 1085 provides that the Court may issue a writ of mandate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).) "[T]he object of the mandamus is to procure enforcement of a public duty." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144 [citations omitted].) The court must determine if the agency failed to proceed "in a manner required by law." (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 568 [citations omitted].) Courts owe no deference to agencies where the law has been misapplied, as "[t]he interpretation and applicability of a statute is a question of law requiring an independent determination by the reviewing court." (*East Pen. Educ. Coun. v. Palos Verde Unif. Sch. Dist.* (1989) 210 Cal.App.3d 155, 165; see also *Catalina Investments, Inc. v. Jones* (2002) 98 Cal.App.4th 1, 6 [applying de novo standard].)

A writ of mandate may be issued to address any of the ways that an agency acts unlawfully. For example, "[w]hen an administrative agency acts in excess of the powers conferred upon it, its action is void [citation]" and "[m]andate will lie to compel it to nullify or rescind void acts [citation]." (*Graves v. Commission on Professional Competence* (1976) 63 Cal.App.3d 970, 976.) A writ of mandate also "may issue to compel the performance of a ministerial duty or to correct an abuse of discretion [citation]." (*Cal. Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 202-03.) One way that an agency may abuse its discretion is through complete inaction. (See, e.g., *AIDS Health Found. v. L.A. County Dept. of Health* (2011) 197 Cal.App.4th 693, 704.) In addition, agency "[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (*Cal. Trout*, *supra*, 218 Cal.App.3d at p. 203 [quoting *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297].)

II. Administrative Procedure Act

The APA provides that "[a]ny interested person may obtain a judicial declaration as to the validity of any regulation . . . by bringing an action for declaratory relief in the superior court . . . ." (Gov. Code, § 11350, subd. (a).) Under the APA, a regulation is valid only where the agency possesses "express or implied" statutory authority; the regulation also must be "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov.

Code, § 11342.2.) Where an emergency regulation is at issue, it may be found invalid "upon the ground that the facts recited in the finding of emergency . . . do not constitute an emergency . . . ." (Gov. Code, § 11350, subd. (a).) Government Code section 11342.545 defines an "emergency" as a "situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare."

"Courts reviewing regulations for compliance with the APA owe *no deference* to the promulgating agency's opinion that it complied with the prescriptions of the APA." (*Sims v. Dep't of Corr. & Rehab.* (2013) 216 Cal.App.4th 1059, 1071, italics added.) Questions of law are reviewed de novo and without deference, including "whether a regulation lies within the scope of the agency's authority." (*Nortel Networks Inc. v. State Bd. Of Equalization* (2011) 191 Cal.App.4th 1259, 1277 [citation omitted].) While agencies do receive deference for a finding of emergency (*Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 194-95), courts must review such a finding to ensure it includes "specific facts demonstrating the existence of an emergency[;] . . . [a] finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency." (Gov. Code, § 11346.1, subd. (b)(2).) When reviewing whether a regulation is "reasonably necessary," a court "must ascertain whether the agency reasonably interpreted its power in deciding that the regulation was necessary to accomplish the purpose of the statute." (*Credit Ins. Gen. Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657 [citation omitted].)

ARGUMENT

I. The Court should issue a writ of mandate to prohibit DOGGR's myriad violations of the explicit, mandatory requirements of the Safe Drinking Water Act and the Memorandum of Agreement that govern the California UIC Program.

DOGGR has ignored and continues to ignore mandatory duties established under SDWA and the MOA. These mandates, instituted by Congress to insure that contamination never occurs, require DOGGR to prohibit any and all injections into protected aquifers. In the face of DOGGR's persistent, outright refusal to follow the law, a writ of mandate must issue.

A. DOGGR's duty to prohibit and prevent all underground injections unless and until an aquifer exemption is granted is explicit and mandatory.

As set forth in the statutory background section, DOGGR's mandate to prohibit and prevent injections into protected aquifers is fixed by statute, in the first instance, under SDWA—which DOGGR sought and accepted responsibility for administering with respect to Class II wells in

California. (40 C.F.R. § 147.250.) SDWA establishes the requirements for all state UIC programs in section 1421(b) of the Act. (42 U.S.C. §§ 300h(b)(1), 300h-4(a).) In mandatory language, section 1421(b) requires that a state UIC program "shall prohibit" any underground injection which is not authorized by permit or rule and, as a necessary predicate to the issuance of any permit or rule, "shall require" proof that the injection "will not endanger drinking water sources." (42 U.S.C. § 300h(b)(1)(A)-(B).) Section 1425 of the Act reiterates that a state program like California's must "prevent underground injection which endangers drinking water sources." (42 U.S.C. § 300h-4(a).) As discussed below, water sources suitable for drinking now or at any time in the future are "endangered" by *any* injection, even that of entirely clean water—let alone toxic-laden oil waste.

The MOA, adopted by both EPA and DOGGR under SDWA, and controlling and enforceable through the agreement's incorporation into the Code of Federal Regulations at 40 C.F.R. § 147.250, unambiguously spells out what must be in place before any underground injection is authorized. In unequivocal terms, the MOA specifies that "an aquifer exemption *must* be in effect prior to or concurrent with the issuance of a Class II permit for injection wells into that aquifer." (AR000408-409, italics added.) In overruling DOGGR's demurrer, this Court has already ruled on the MOA's applicability and explicit directive, stating that the "MOA prohibits the issuance of a Class II permit for injection wells into an aquifer unless there is an aquifer exemption in place." (Order Overruling DOGGR's Demurrer (Oct. 5, 2015) at p. 2.)

DOGGR understands and admits SDWA's nondiscretionary, blanket prohibition against injections into protected aquifers and the binding, mandatory force of the same prohibition as set forth in the MOA. Indeed, DOGGR admitted in a recent rulemaking notice that the "allowance of injection wells in non–exempt [underground sources of drinking water] conflicts with the terms of the Division's Primacy Agreement with US EPA, which defines the parameters of the State's federally–approved UIC program." (Exh. A to Decl. of H. Kretzmann (May 18, 2016) [Notice of Proposed Rulemaking Action re Permanent Regulations (May 29, 2015)] at p. 4.) DOGGR explained this is so because "[t]he Primacy Agreement *mandates* that the Division will *not authorize injection* into aquifers that contain less than 10,000 mg/L TDS *unless . . . an exemption has been* designated by the Division and *approved* by US EPA." (*Ibid.*, italics added.) In other words, as DOGGR conceded, "aquifers are subject to protection . . . unless and until they are covered by an aquifer exemption." (*Id.* at p. 5; see also AR000043 [DOGGR's statement in Revised Finding of Emergency that it must "completely unwind all State-approved injection into non-exempt . . .

aquifers"]; *Id.* at 41, 43 [DOGGR admissions that it has "improperly approved" wells "for injection into non-exempt aquifers" with permits that the agency must "reverse" in order "to bring the State's UIC program into compliance with the Safe Drinking Water Act"].)

B. DOGGR has violated and continues to violate its mandatory duties.

Despite their plain and explicit language, DOGGR defies the mandates of SDWA and the MOA in at least three respects that necessitate issuance of a writ of mandate.

1. DOGGR's emergency regulations violate explicit prohibitions in SDWA and the MOA against authorizing injections into protected aquifers.

Through the adoption of its emergency regulations, DOGGR has purported to authorize the continued operation of thousands of injection wells in protected aquifers, despite the failure to first obtain aquifer exemptions for these injections. Though DOGGR attempts to characterize the safe harbor as a "compliance schedule," going so far as to name the regulations as such, in reality they function as an authorization of unlawful injection in direct violation of the explicit requirements of law. The emergency regulations flatly contradict SDWA section 1421(b)(1)(B), which mandates that "no rule may be promulgated which authorizes any underground injection which endangers drinking water sources" (42 U.S.C. § 300h(b)(1)(B)), and any well that injects without having secured an aquifer exemption endangers drinking water sources *per se* under SDWA. (*Id.*; *King*, *supra*, 660 F.3d at p. 1079 ["in the absence of a showing by the applicant that a proposed injection is safe, the SDWA presumes that the injection will endanger an USDW"].) Authorizing injections without exemptions also directly contravenes the MOA, which "prohibits the issuance of a Class II permit for injection wells into an aquifer unless there is an aquifer exemption in place." (Order Overruling DOGGR's Demurrer (Oct. 5, 2015) at p. 2 [citing AR0000409-410 (MOA pp. 6-7)].)

DOGGR's emergency regulations therefore are invalid on their face. No agency is empowered to violate "statutory commands" or to act otherwise "in excess of the powers conferred upon it," as DOGGR has done here. (*Cal. Trout*, *supra*, 218 Cal.App.3d at pp. 202-03; *Graves*, *supra*, 63 Cal.App.3d at p. 976.) Under such circumstances, the agency action is "void" and mandamus lies "to compel it to nullify or rescind the void acts." (*Graves*, *supra*, 63 Cal.App.3d at p. 976; see also *Cal. Trout*, *supra*, 218 Cal.App.3d at pp. 201-03 [mandate will lie where action "transgresses the confines of the applicable principles of law"].) The Court therefore should issue a writ of mandate that rescinds the unlawful and consequently void emergency regulations. Further, the Court should direct DOGGR to take all necessary action to stop injections into protected aquifers immediately.

2. Allowing continued injection is a violation of DOGGR's duty to cease all injections into protected aquifers immediately.

DOGGR has violated SDWA and the MOA by its failure to halt thousands of injection wells operating in violation of SDWA and the MOA—including both wells that have received unlawful permits as well as wells that are injecting into protected aquifers despite having never received any UIC permit or authorization at all.

SDWA section 1421(b)(1)(A) requires DOGGR to prohibit and prevent all underground injections not authorized by a valid permit. (42 U.S.C. § 300h(b)(1)(A).) Here, DOGGR admits that some 2,500 wells are injecting into protected aquifers under permits that the agency concedes it "is required to reverse" because they were "improperly approved." (AR000041, 43 [Revised Finding of Emergency].) These permits were undeniably unlawful when issued and void as a matter of law. "[I]t is well settled that 'when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void.'" (*City and County of San Francisco v. Padilla* (1972) 23 Cal.App.3d 388, 400; *Graves*, *supra*, 63 Cal.App.3d at p. 976 [same].) Further, because an agency "has no discretion to issue a permit in the absence of compliance" with the law, "[i]t follows that [the] permits must be revoked." (*Horowitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344, 1355-56.) Consequently, the Court should issue a writ of mandate to compel DOGGR to rescind all of the void permits it issued authorizing injections into protected aquifers. (*Graves*, *supra*, 63 Cal.App.3d at p. 976 ["Mandate will lie to compel [agency] to nullify or rescind the void acts"].) DOGGR easily could achieve such a rescission through issuance of a new, lawful emergency regulation. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 575 [issuing writ "commanding" State Bar to "reformulate the existing rules" on the Client Security Fund].)[4]

The Court also should issue a writ of mandate directing DOGGR to halt immediately all *non-permitted* injections into protected aquifers. As noted above, apart from the more than two thousand wells injecting pursuant to permits that the agency now concedes were unlawful, DOGGR refuses to stop even the 3,600 cyclic steam injection wells operating in protected aquifers that *have no injection permit whatsoever*. DOGGR's excuse for inaction, that these wells supposedly are low risk (Exh. J to Decl. of T. Zakim (May 18, 2016) [DOGGR Letter (July 31, 2015)] at p. 1) is legally irrelevant.

[4] DOGGR may also issue emergency orders to individual operators. Public Resources Code section 3235 authorizes DOGGR to do so immediately, and DOGGR in fact has already done so for 23 wells by means of emergency orders. (See, e.g., Exh. H to Decl. of T. Zakim (May 18, 2016) [DOGGR Emergency Orders (July 2, 2014) stating that "[i]njection into these wells pose[d] a danger to life, health, property, and natural resources . . . ."] at p. 2.)

SDWA absolutely forbids "*any* underground injection . . . which is not authorized by a permit" and, in fact, a person who injects in violation of the Act's permit requirement is subject to civil and criminal liability. (See 42 U.S.C. § 300h(b)(1)(A) [prohibiting injections] [italics added]; *id.* at § 300h-2(b)(2) [civil and criminal actions]; *King*, *supra*, 660 F.3d at pp. 1076-78 [upholding conviction for willful violation of permit requirement].) Consequently, lacking permits, these wells are patently unlawful even if they are not operating in a protected aquifer. (*King*, *supra*, 660 F.3d at p. 1076 [stating that "the absence of a permit under Idaho's UIC program" was sufficient to establish a SDWA violation].) In the face of such unlawful inaction by DOGGR—disregarding both SDWA's permit requirement and the prohibition against injections in protected aquifers without an exemption—the Court should issue a writ of mandate directing the agency to take all action necessary to halt any injection well operating in a protected aquifer without a permit immediately, including the identified 3,600 cyclic steam wells. (See *Cal. Trout*, *supra*, 218 Cal.App.3d at pp. 201-03.)

3. DOGGR's stated intention to issue new permits for injection wells in protected aquifers until 2017 both violates explicit prohibitions in SDWA and the MOA and constitutes arbitrary decision making.

Remarkably, even though DOGGR has acknowledged that it must eliminate all injections into protected aquifers (AR000041 [Revised Finding of Emergency]), the agency has *refused to cease issuing new*, *admittedly unlawful* permits. To the contrary, DOGGR continues to issue new permits for injection wells that lack an aquifer exemption and has announced its intention to do so through 2017. Between December 22, 2014 and November 5, 2015, DOGGR issued at least 66 *new* injection permits to operators of wells in protected aquifers. (AR000475-968 [Index pp. 5-8]; Exh. C to Decl. of T. Zakim (May 18, 2016) [Letter From DOGGR's Counsel Regarding Record (Apr. 7, 2015), describing contents of writ record including wells newly authorized into non-exempt aquifers]; AR000155 [DOGGR letter of Feb. 6, 2015 stating "new wells that are part of a previously approved project may be permitted" even if aquifer has not received exemption].)

DOGGR's issuance of these new permits violates the explicit prohibitions in SDWA and the MOA. Under SDWA section 1421(b)(1)(B), any application for a new injection well permit that lacks an aquifer exemption must be automatically denied. (42 U.S.C. § 300h(b)(1)(B).) Likewise, the MOA commands automatic denial of any such permit application, stating as it does that "an aquifer exemption must be in effect prior to or concurrent with the issuance of a Class II permit." (AR000409-410 [MOA]; see also Order Overruling DOGGR's Demurrer (Oct. 5, 2015) at 2 ["Th[e]

MOA prohibits the issuance of a Class permit for injection wells into an aquifer unless there is an aquifer exemption in place"]). DOGGR may not issue permits in violation of the law. (See, e.g., *City and County of San Francisco*, *supra*, 23 Cal.App.3d at p. 401 ["it would be the Bureau's legal duty to refuse to issue a permit that was in violation of the Planning Code"].) In the face of DOGGR's ongoing, intentional defiance of the unequivocal mandates of SDWA and the MOA until 2017, the Court should issue a writ of mandate directing DOGGR to deny any and all injection well permit applications for protected aquifers. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 504 [finding mandamus is proper where law "clearly defines the . . . course of conduct that a governing body must take"]; *Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 824 [finding it is within the power of the court to order officials to refrain from contract issuance].)

The Court should issue a writ of mandate directing DOGGR to deny these permit applications for a second, independent reason: it is the epitome of arbitrary and unlawful agency action for DOGGR to say one thing but do the exact opposite. Here, DOGGR has made findings that its practice of allowing injections into protected aquifers is "improper[]," "fall[s] short of the Safe Drinking Water Act's minimum requirements," "conflicts with the terms of the Division's Primacy Agreement with US EPA," and must be "phase[d] out." (AR000041 [Revised Finding of Emergency]; (Exh. A to Decl. of H. Kretzmann (May 18, 2016) [Notice of Proposed Permanent Rulemaking (May 29, 2015)] at p. 4-5.) Yet instead of immediately eliminating an admittedly unlawful practice, the agency is committing *new* violations, at least until 2017. With no "rational connection" between DOGGR's decision, the "relevant factors," and the "purposes of the enabling statute," any new permits necessarily are arbitrary, capricious, and unlawful. (*Hi-Desert Med. Ctr. v. Douglas* (2015) 239 Cal.App.4th 717, 730, as modified (Sept. 15, 2015) [citing *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 585–586]; *Baldwin-Lima-Hamilton Corp.*, *supra*, 208 Cal.App.2d at p. 824.)

C. There are no grounds to excuse DOGGR's failure to fulfill its mandatory duties.

DOGGR has advanced several arguments in this litigation why, in its estimation, the Court should ignore these explicit requirements and forego issuing a corrective writ of mandate. (See, e.g., DOGGR Demurrer Br. at 8-10.) All of DOGGR's reasons lack merit.

First, DOGGR has argued that there is insufficient "evidence of contamination from any specific oil and gas wells." (*Id.* at 9.) This defense is meritless as SDWA does not require proof of contamination. SDWA is wholly preventative and bans injections into protected aquifers, period.

Indeed, because of Congress's express focus on preventing contamination in the first instance, the Act prohibits even injections of pure water into protected aquifers, even though "this approach may result in forbidding some injections that would not contaminate an [underground source of drinking water]." (*King*, *supra*, 660 F.3d at p. 1080; see also 42 U.S.C. § 300h(b).) Here, of course, oil and gas operators are not injecting pure water but wastewater that has been known to contain benzene and many other harmful chemicals. (See discussion, *supra*, at pp. 5-6.) Preventing injections before they cause damage is essential because "once an aquifer is contaminated, it cannot be remediated." (Court Order Denying Preliminary Injunction (July 16, 2015) at p. 2; see also AR000182 [Joint Hearing Transcript, in which State Water Board Deputy Director Bishop states "you don't clean up aquifers, you contain the spread of contamination"].) In any event, DOGGR's very act of authorizing ongoing or new injections without an aquifer exemption, which constitutes the only legally acceptable proof that injection is safe and may take place, necessarily "endangers" drinking water supplies within the meaning of, and in violation of, SDWA and the MOA. DOGGR simply may not reinterpret or ignore the clear statutory language.

For the same reason, DOGGR's mischaracterization of its own actions as "efficiently and effectively address[ing] the problems in the UIC program" (DOGGR Demurrer Br. at p. 10) is of no moment. The lone question before the Court is "the legality of [DOGGR's actions], not their wisdom" (*Morris v. Williams* (1967) 67 Cal.2d 733, 737), and "[a] court cannot ignore the ongoing violation of a statutory mandate on the ground that the violation will eventually be halted by untimely administrative action." (*Cal. Trout*, *supra*, 218 Cal.App.3d at p. 203.)

Even assuming DOGGR's claims of efficiency and effectiveness could excuse DOGGR's misconduct (which they cannot), they do not pass scrutiny. Consider, for example, DOGGR's insistence that the only alternative to the agency's existing emergency rulemaking and two-year schedule is to address each of the 2,500 wells in individual administrative enforcement proceedings, a process that DOGGR insists would be difficult and protracted. (DOGGR Demurrer Br. at 10; AR000003 [DOGGR Response to Comments].) DOGGR has in no way substantiated that individual enforcement proceedings are the exclusive alternative to the emergency rule. Here, DOGGR has already promulgated an emergency rule that forces wells to cease operations in 2017 without pursuing any individual enforcement proceedings. It can exercise the same rulemaking authority to do what the law commands: prohibit these injections immediately. In fact, the Court already has found that if it "were to invalidate the challenged emergency regulations, DOGGR could still

comply . . . by proposing new, more robust emergency regulations." (Order denying Aera Demurrer (Oct. 5, 2012) at p. 2.)

DOGGR's claim that it is effectively phasing out unlawful injections is also disproven by its actions to the contrary. The agency cannot credibly claim that it is addressing injections in aquifers when it has decided both (i) to *forego shutting down* the unpermitted cyclic steam wells it has identified as injecting in protected aquifers; and (ii) to continue to add to the problem by *authorizing new injections* into protected aquifers through 2017. (See discussion, *supra*, at pp. 8-9, 14-16.) Equally troubling and arbitrary is DOGGR's failure to complete a timely review of the remaining 30,000 well files to ensure that all unlawful injections into protected aquifers are identified and addressed. DOGGR and EPA agreed that DOGGR would review 30,000 well files by February 15, 2016, and "bring[] them into compliance" no later than the final, February 15, 2017 deadline established in the emergency regulations. (AR000465 [EPA Letter (Mar. 9, 2015)]; see also AR000468-469 [listing DOGGR's file review obligations].) The deadline has come and gone, however, and DOGGR still has not completed its review. Consequently, these wells continue to inject while DOGGR sits in ignorance of how many of these wells are operating in protected aquifers. In light of these facts, it simply cannot be said that DOGGR is addressing the problems of the UIC program; to the contrary, it is actively perpetuating continued injections into protected aquifers.

Finally, a writ of mandate does not interfere with what the agency calls its "enforcement" ability. (DOGGR Demurrer Br. at pp. 9, 11.) This is so because DOGGR's actions cannot credibly be construed as enforcement. The enforcement of laws does not entail creating safe harbors for their violation or of agency-confabulated decrees that violations are not too "risky." These actions by DOGGR are simply ultra vires. In actuality, the emergency regulations excuse and delay resolving DOGGR's *own* wrongful conduct—i.e., its unlawful issuance of thousands of permits for injections into nonexempt aquifers. Despite its admission that the permits were "improperly approved," the agency has self-servingly awarded itself nearly two years to "reverse" and "completely unwind" a problem of its own making. (AR0000041, 43 [Revised Finding of Emergency]; AR000003 [DOGGR Response to Comments].) But there is no need or justification for a protracted process of reversal, because those permits were void *ab initio*. (*City and County of San Francisco*, *supra*, 23 Cal.App.3d at p. 400; *Graves*, *supra*, 63 Cal.App.3d at p. 976; *Horowitz*, *supra*, 124 Cal.App.4th at pp. 1355-56.) DOGGR's rulemaking, then, is not an enforcement action at all; it is an action that

prolongs the agency's own misfeasance and, in the meantime, creates a safe harbor until as late as 2017 for operators to continue injections that never were lawful.

II. The Court should declare that DOGGR's emergency regulations violate the Administrative Procedure Act and therefore are invalid.

As set forth above, DOGGR has been administering the state's UIC Program in blatant violation of the agency's mandatory duties under SDWA and the MOA. In addition, the emergency regulations separately violate fundamental APA requirements for agency rulemaking. To be valid, emergency regulations must meet each of the following criteria: (1) they must be consistent with governing authority; (2) the basis for their enactment must constitute a valid emergency; and (3) the regulations must be reasonably necessary to effectuate the purpose of SDWA and the MOA. The emergency regulations meet none of these criteria.

A. The emergency regulations fail the APA's consistency requirement because they violate SDWA and the MOA.

In order to adopt emergency regulations as DOGGR has done here, the APA requires both that DOGGR have "authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute" and that the regulations be "consistent and not in conflict with the statute . . . ." (Gov. Code, § 11342.2.) The APA further defines "consistency" to mean "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (*Id.*, § 11349, subd. (d).) Whether DOGGR's emergency regulations meet the APA's consistency requirements is an issue of law, reviewed de novo, with respect to which DOGGR receives no deference. (*Nortel Networks, Inc.*, *supra*, 191 Cal.App.4th at p. 1277; *Envtl. Prot. Info. Ctr. v. Dep't of Forestry & Fire Prot.* (1996) 43 Cal.App.4th 1011, 1022 ("*EPIC*").) As discussed above, the emergency regulations are not just in conflict with SDWA and the MOA, they completely repudiate its core provisions.

Unable to reconcile its rulemaking with SDWA and the MOA, DOGGR's discussion of the APA's consistency requirement in its "Finding of Emergency" ignores the specific requirements of SDWA and does not even mention the MOA. (AR000045.) Though DOGGR identifies authorities in its Notice of Proposed Emergency Rulemaking that it claims authorize the regulations (AR000019), general provisions giving DOGGR authority to administer the UIC program do not supersede the specific, explicit, and fundamental limitations of SDWA and the MOA. Further, the agency's assertion that it promulgated the regulations to eventually "achieve compliance" with SDWA likewise does not render them consistent. Consistency with law does not turn on whether a

regulation is "the most practical" or an "appropriate" approach. (*Santa Cruz v. State Bd. of Forestry* (1998) 64 Cal.4th 826, 833-834.) Rather, it is a question of law. Pursuant to the APA's consistency requirement, full and immediate compliance with governing law is required. (Gov. Code, § 11349, subd. (d).) An agency therefore may not grant a "safe harbor" from statutory mandates or other binding legal authority. (*Cleary v. Cty. of Alameda (*2011) 196 Cal.App.4th 826, 839-40 [finding a regulation that provided a "safe harbor" violated APA's consistency requirement].)

Because DOGGR's emergency regulations are not consistent with SDWA and the MOA, the Court should declare the regulations invalid and order DOGGR to vacate them. (Gov. Code, § 11350, subd. (a); *EPIC*, *supra*, 43 Cal.App.4th at p. 1022 [where governing law specifically prohibited an exemption created by a Board of Forestry regulation, the court found the Board's regulation unauthorized and invalidated it, notwithstanding other nonspecific provisions granting administrative agency authority to adopt regulations]; see also *Los Angeles Cty. v. State Dep't of Pub. Health* (1958) 158 Cal.App.2d 425, 445 ["It is argued that an injunction is not permissible in a declaratory relief action. The law is to the contrary . . . ."] [citing *Knox v. Wolfe* (1946) 73 Cal.App.2d 494, 505].)

B. The facts recited in DOGGR's finding of emergency do not constitute an emergency as defined by the APA.

This Court must invalidate DOGGR's emergency regulations if it determines that the agency's finding of emergency fails to recite facts that "constitute an emergency within the provisions of Section 11346.1." (Gov. Code, § 11350, subd. (a).) Pursuant to Section 11346.1, DOGGR's finding of emergency "shall include . . . a description of the specific facts" that demonstrate the "existence of an emergency" as well as the "need for immediate action." (Gov. Code, § 11346.1(b)(2); see also *California Med. Assn. v. Brian* (1973) 30 Cal.App.3d 637, 651 [defendant has burden of proof to establish facts supporting emergency].) DOGGR's finding of emergency does not satisfy these requirements.

DOGGR cites the threat of EPA's revocation of UIC program primacy and resulting, unspecified regulatory disruption and burdens for industry operators as the basis for its purported emergency. (See, e.g., AR000042 [Revised Finding of Emergency, stating "US EPA has made clear that the Division's failure to phase out injection into the affected aquifers . . . would seriously jeopardize the federal government's ongoing approval of the State's UIC program"]; *ibid.* ["Significant regulatory uncertainty and burden would be introduced" if EPA took over the program].) But citing a speculative EPA takeover does not satisfy the APA's emergency

requirement. "A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the existence of an emergency." (Gov. Code, § 11346.1(b)(2).) Here, DOGGR cites no facts that prove the immediacy of an EPA primacy revocation effort. (See AR000043 [Revised Finding of Emergency].) To the contrary, EPA has not taken any steps to revoke DOGGR's primacy, despite uncovering DOGGR's wrongdoing at least as early as 2011.[5] Moreover, DOGGR's speculation that—were EPA to retake direct oversight of the protection of California's water resources—EPA would perform even worse than DOGGR, is also unsupported. (See AR000042-4 [Revised Finding of Emergency].) Nor does DOGGR provide "specific facts" (Gov. Code, § 11346.1(b)(2)) that show how or why industry would be "burden[ed]" if EPA were to take charge (other than, presumably, by having to meet the SDWA requirements that protect California aquifers). (*Ibid.*) Indeed, given DOGGR's years of SDWA violations and continued SDWA non-compliance, it is unsubstantiated—if not also hypocritical—to claim that EPA's taking direct control of California water safety would constitute a "public emergency."

The APA defines the existence of a true "emergency" as a "situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) Significantly, however, DOGGR cites no public peace, health, or safety concerns as the basis for its emergency regulations. It cannot, because no such concerns could justify the continued injections into protected aquifers. Instead, DOGGR makes conclusory reference to public health and safety only twice in its six-page "Basis For Its Finding of Emergency." In both instances, DOGGR fails to provide specific facts that demonstrate the agency's public health and safety concerns, much less show how allowing unlawful injections into protected aquifers for two more years would alleviate such concerns and thereby require "immediate action" under Government Code section 11346.1(b)(2). (See, e.g., AR000044 [stating without factual support that "failure to adopt the compliance schedule would be detrimental to public health and safety"]; AR000044-45 [stating emergency action was required "so as to maximize the transparency of the corrective actions being undertaken, as well as any associated impacts on public health and safety, the environment, or natural resources"].)

[5] Indeed, this Court has acknowledged that, while "there are formal procedures for revising or withdrawing [EPA's] grant of primacy[,] . . . the EPA has not initiated" these procedures. (See Order Overruling Aera Demurrer at p. 1.)

Similarly, DOGGR's single mention of the "general welfare" in its Finding of Emergency turns on the agency's concern about cost increases to private industry operators should operators be required to stop injecting toxic drilling fluids into California's protected aquifers. (See AR000044 ["abrupt disruption of [industry] operation would be detrimental to general welfare"].) But DOGGR does not substantiate with specific facts how public welfare is in imminent danger from purported impacts to industry capital investments, or how costs to private operators that result from mandatory public aquifer protections could trump the need for those protections.

In asserting that the emergency is a result of the agency's lack of adequate time to address SDWA non-compliance, DOGGR admits to its systemic and persistent regulatory failures beginning at least as early as 2011. (See, e.g., AR0000043-46 [Revised Finding of Emergency, stating "[t]he timeframe for the non-emergency rulemaking process would not enable an enforceable regulatory compliance schedule to be adopted before critical compliance deadlines will have already passed"].) Instead of immediately prohibiting unlawful well injection via emergency action, however, DOGGR creates safe harbors that shield existing operators of unlawful injections—*as well as any additional unlawful injections newly authorized by DOGGR through 2017*—from daily fines and all other legal remedies for years, in an abdication of its mandatory duty under SDWA and its obligations to the public. (See, e.g., Pub. Res. Code, §§ 3236, 3236.5.)

Self-created "emergencies" are not legitimate grounds for emergency regulations under the APA. DOGGR's "finding of and statement of facts constituting an emergency must be more than mere 'statements of the motivation' for the enactment and provide an adequate basis for judicial review." (*Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 941 [citation omitted]; see also *Marshall v. Pasadena Unified Sch. Dist.* (2004) 119 Cal.App.4th 1241, 1245, *as modified on denial of rehg.* (July 28, 2004) [finding no "sudden, unexpected occurrence" that posed a clear and imminent danger requiring prompt action to protect life, health, property or essential public services where the "purported emergency" stemmed from the defendant's own decision, motivated by convenience].) Here, DOGGR's Finding of Emergency consists of "statements of motivation" based in speculation about a hypothetically imminent EPA revocation of primacy, an explicit desire to protect industry operators for several more years from the costs associated with protecting California's water resources and complying with law, and concerns about the burdens and inconvenience of individual administrative actions to unwind unlawful permits. (See, e.g. AR000002). Rather than demonstrate a "sudden, unexpected occurrence" posing a "clear and imminent danger requiring prompt action"

(*Marshall, supra,* 119 Cal.App.4th at p. 1245), DOGGR's statements amount to factors of "expediency, convenience, best interest, general public need, [and] speculation" that the APA explicitly provides are inadequate to demonstrate the existence of an emergency. (Gov. Code, § 11346.1, subd. (b)(2).)

Finally, even assuming DOGGR could demonstrate with specific facts the existence of an emergency consistent with APA requirements—which it has not done here—the agency is precluded from addressing its emergency via regulations that violate SDWA and the MOA. Emergency regulations are valid under the APA only if *all* of its requirements, including the provisions of APA sections 11342.2 and 11350, are met. Regardless of how dire an agency believes its purported emergency to be, the APA does not permit violations of the agency's own enabling statutes or other laws of the land. No demonstration of emergency permits DOGGR to supersede the requirements of the APA, nor the mandates of SDWA or the MOA. For these reasons, this Court should find DOGGR's emergency regulations invalid.

C. The emergency regulations are not reasonably necessary to effectuate the purpose of SDWA and the MOA.

DOGGR's Finding of Emergency must also provide substantial evidence demonstrating that the regulations are "reasonably necessary to carry out the purpose and address the problem for which it is proposed." (*Sims*, *supra*, 216 Cal.App.4th at p. 1079; see also Gov. Code, § 11346.1(b)(2).) "'Necessity' means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute . . . or other provision of law that the regulation implements . . . , taking into account the totality of the record." (Gov. Code, § 11349, subd. (a).) Substantial evidence is that which is "reasonable, credible and of solid value." (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 308, citing *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 ["Substantial evidence . . . is not synonymous with 'any' evidence"].)

A regulation is necessary "to effectuate the purpose of the statute" where the "purpose of a statute cannot be fully effectuated" without the regulations. (*California Forestry Ass'n v. California Fish & Game Comm'n* (2007) 156 Cal.App.4th 1535, 1554 [where governing law was not self-implementing, implementing regulations by an agency were deemed necessary].) Here, SDWA's preventative purpose is fully effectuated by the MOA's flat prohibition on injections into protected aquifers. DOGGR claims that the purpose of its emergency regulations is to ensure that all Class II UIC wells are operating consistent with the MOA's prohibition. (See, e.g., AR000041 [Revised

Finding of Emergency, stating that emergency regulations are necessary for "eliminating injection into aquifers that are protected under the federal Safe Drinking Water Act"].) But DOGGR's emergency regulations—which delay the agency's compliance with its mandatory duty under SDWA and allow existing and newly authorized wells to inject unlawfully into California's protected groundwater resources in the meantime—disable, rather than implement, SDWA and the MOA's key preventative provisions.

The MOA prohibition on injections into protected aquifers is both self-implementing and an effectuation of SDWA's preventative purpose, unlike governing law in other contexts that anticipates and necessitates an agency's promulgation of regulations to be implemented. (See, e.g., *California Forestry*, *supra*, 156 Cal.App.4th at 1554.) DOGGR fails to provide substantial evidence demonstrating how its emergency regulations' safe harbor for unlawful injections effectuates the explicit precautionary purpose of SDWA and the MOA to protect underground sources of drinking water, much less demonstrating that the regulations are "necessary" to do so. (See *Clean Air Constituency v. California State Air Res. Bd.* (1974) 11 Cal.3d 801, 816 [an agency regulation that delayed facilitation of the "goals" and "purposes" of governing law being implemented found invalid]; see also *Sims, supra,* 216 Cal.App.4th at pp. 1079-80 [where no rationale for or alternatives to specific terms of regulation were provided, regulations invalidated for failure to meet APA necessity requirement].) Tellingly, the Finding of Emergency mentions neither SDWA's precautionary purpose nor the agency's specific mandatory duty under the MOA. (AR000045.) Nor does DOGGR address how its regulations effectuate the purpose of SDWA in light of that statute's express provision that "no rule may be promulgated which authorizes any underground injection which endangers drinking water sources." (42 U.S.C. § 300h(b)(1)(B).) Absent substantial evidence showing that DOGGR's emergency regulations meet the APA's necessity requirement, the regulations must be declared invalid.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' petition for writ of mandate and issue the requested declaratory and corresponding injunctive relief.

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Respectfully submitted,

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